APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1323

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal From the
	*	United States
Gregory Richard Fogarty,	*	District Court
	*	for the District
Appellant.	*	of South Dakota
	*	

Submitted: September 16, 1982

Filed: November 10, 1982

Before BRIGHT, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge

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FLOYD R. GIBSON, Senior Circuit Judge.

Gregory Richard Fogarty was convicted at a bench trial on stipulated facts of one count of conspiracy to import marijuana in violation of 21 U.S.C. §§ 952(a) and 96? (1976), and one count of conspiracy to possess marijuana with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. Fogarty appeals his conviction, claiming (1) that the district court[1] should have granted his motion to dismiss the indictment under the Speedy Trial Act of 1974 and (2) that the classification of marijuana in the Federal Controlled Substances Act is arbitrary and capricious, violating the due process and equal protection mandates of the Fifth Amendment to the United States Constitution. We reject Fogarty's claims and affirm his conviction.

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[1]The Honorable Donald J. Porter, United States District Judge, District of South Dakota.

I. Factual Background

A federal grand jury indictment was handed down on August 19, 1981, charging Fogarty and six others with conspiracy to import and distribute marijuana. The indictment, which was made public on October 23, 1981,[2] culminated a lengthy and complicated Federal Drug Enforcement Administration investigation beginning January 20, 1980, when a DC-7 aircraft containing 26,000 pounds of marijuana (with an estimated street value of approximately $18 million) landed in north central South Dakota and was seized by local law enforcement officers. The indictment named ten unindicted coconspirators and alleged forty-five overt acts occuring at various places in eight states and three foreign countries.

Fogarty was arraigned on September 8, 1981 and was joined for trial with four other

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[2]Because some of the defendants were at large, the indictment remained sealed until October 23, 1981.

indicted coconspirators (codefendants). Beginning in mid-October, 1981, Fogarty's codefendants filed numerous pretrial motions. The district court issued an order on October 23, 1981 requiring all pretrial motions to be submitted by November 13, 1981, with the United States having until November 27, 1981 to respond and the defendants having an additional five days to file their replies. On November 2, 1981, the district court scheduled the defendants' trial for December 7, 1981.

Among the pretrial motions were the continuance motions filed by three of Fogarty's codefendants on October 15, 1981. While Fogarty did not join in these motions, he did file eight petrial motions of his own on November 16, 1981, including a motion to sever his trial from the other defendants and a motion to dismiss the indictment for failure to comply with the Speedy Trial Act.

On November 24, 1981, the district court issued an order granting the three codefendants' motion to continue and moving the

trial from December 7, 1981 to January 6, 1982. On December 10, 1981, the court denied Fogarty's motions to dismiss and to sever and, accordingly, determined that Fogarty would be tried along with his four coconspir-ator/codefendants on January 6, 1982. The remaining pretrial motions were disposed of on December 22, 1981.

Before January 6, 1982, Fogarty's four codefendants pled guilty under plea bargaining agreements. Fogarty was tried pursuant to stipulated facts on January 6, 1982. His right to raise the issues in the instant appeal were expressly preserved at trial.

II. Speedy Trial Act

Fogarty contends that his trial was not timely under the Speedy Trial Act of 1974, 18 U.S.C. § 3161-3174 (1976) (Act), and, therefore, the district court should have dismissed the indictment against him.

Fogarty specifically urges that the 119-day delay between his arraignment on

September 8, 1981 and the commencement of his trial on January 6, 1982 violated §3161(c)(1) of the Act which provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Thus, assuming that Fogarty's arraignment on September 8, 1981 started the seventy-day count, a timely trial would have begun on November 16, 1981, barring periods of excludable delay.

However, § 3161(h) of the Act sets forth a list of various periods of delay which are to be excluded when computing the elapsed time within which the trial must commence. Two of these "excludable time" provisions apply in this case to bring Fogarty's trial on January 6, 1982 within the seventy-day limit.

First, § 3161(h)(1)(F) (as amended 1979), provides in relevant part:

> (h) The following periods of delay shall be excluded in computing the time within which . . . the trial of any such offense must commence:
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
> >
> > . . . .
> >
> > (F) Delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

In this case, the court was faced with numerous overlapping pretrial motions which were pending continuously from October 15, 1981, when the three codefendants' continuance motions were filed, until December 22, 1981, when the district court finally disposed of the remaining pretrial motions. Section 3161(h)(1)(F) clearly requires automatic exclusion of the sixty-one days during which such pretrial motions were continuously

pending. United States v. Brim, 630 F.2d 1307, 1312-13 (8th Cir. 1980) cert. denied, 452 U.S. 966 (1981).

A second "excludable time" provision of the Act applies here to the thirty-day delay resulting from the district court's continuance of the trial date from December 7, 1981 to January 6, 1982. Section 3161(h)(8)(A) empowers the judge to grant a continuance motion if he finds that the "ends of justice" so require. That section also provides that any delay resulting from such a continuance shall be excluded from the computation of trial days so long as the trial court "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Section 3161(h)(8)(B) accordingly provides, in relevant part:

> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance . . . are as follows:

> (ii) Whether the case is so unusual or so complex due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> . . . .
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

In this case, the court clearly articulated on the record its reasons for continuing the defendants' trial date from December 7, 1981 to January 6, 1982. The court specifically noted the complexities of the instant

case due to the existence of seven defendants, ten unindicted coconspirators and forty-five alleged separate overt acts that took place over seven states and three foreign countries. The court also found that one of the codefendant's counsel had a significant trial conflict which neces-sitated a continuance to assure "continuity of counsel." We find these reasons valid and, therefore, agree with the district court's conclusion that "the ends of justice served by granting the motion for continuance . . . outweigh the best interests of the public and the individual defendants in a speedy trial." Accordingly, the thirty-one-day delay resulting from the continuance is excludable time under § 3161(h)(8)(A).

Finally, these exclusions of sixty-one and thirty days apply to Fogarty despite his failure to join the pretrial continuance motions and his unsuccessful attempt to sever. The Act specifically addresses the application of exclusions to multiple defendant cases such as this one. Section 3161(h)(7) provides that a court shall exclude:

> A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

We agree with the D.C. Circuit's view that "[this provision] is crucial in a case involving multiple defendants because it provides that an exclusion applicable to one defendant applies to all codefendants." United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980); accord, United States v. Manbeck, 514 F. Supp. 152, 154-55 (D. D.C. 1981). Applying this provision here, we note that: (1) Fogarty's severance motion was never granted and he was to be tried along with his coconspirators/codefendants; (2) the January 6, 1981 trial date was clearly timely as to Fogarty's codefendants who successfully sought continuances; (3) the district court properly determined that the delay resulting from the granting of the continuance motions was reasonable.

In view of the foregoing, the sixty-one days and thirty days of "excludable time"

should be subtracted from the 112 days which elapsed between Fogarty's arraignment and his trial. Hence, Fogarty's trial on January 6, 1981 was well within the seventy-day limit.

III. The Controlled Substance Act

Fogarty also contends that his conviction should be reversed because of the alleged unconstitutionality of the Federal Controlled Substance Act. 21 U.S.C. §§ 801-904 (1976) (CSA or Act). Specifically, Fogarty claims that classification of marijuana as a Schedule I controlled substance, [3] id. at § 812(b), Schedule I(c)(10), is irrational

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[3] The severity of statutory sanctions for drug distribution and related offenses depends on the schedule in which the drug is classified, with the most severe penalties typically attaching to Schedule I substances and the least severe penalties attaching to Schedule IV and V substances. 21 U.S.C. § 841(b). Congress made the initial classifications of controlled substances. However, recognizing that scientific information concerning controlled substances could change, Congress empowered the Attorney General to hear petitions for the reclassification or removal of drugs from the schedules. Id. at § 811.

and arbitrary, violating the due process and equal protection mandates of the Fifth Amendment to the United States Constitution. The gist of this claim is that the weight of current medical knowledge purportedly shows that marijuana does not satisfy the three statutory criteria necessary for inclusion in Schedule I -- (A) high potential for abuse, (B) no currently accepted medical use, and (C) lack of accepted safety for use of the drug under medical supervision. 21 U.S.C. § 812(b)(1). Fogarty places particular emphasis on the number of currently accepted medical uses for marijuana, including therapeutic uses in the treatment of glaucoma and cancer.

In addressing this argument, we first note the highly deferential standard of review applicable here. Because there is no fundamental constitional right to import, sell, or possess marijuana, the legislature classification complained of here must be upheld unless it bears no rational relationship to a legitimate government purpose. United States v. Kiffer, 477 F.2d 349, 352 (2nd Cir.

1972), cert. denied, 414 U.S. 831 (1973). Accordingly, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . . " New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Furthermore, judicial self-restraint is especially appropriate where as here the challenged classification entails legislative judgments on a whole host of controversial medical, scientific, and social issues. Marshall v. United States, 414 U.S. 417, 427 (1974); also see Kiffer, 477 F.2d at 352. As noted in Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1954): "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

With this in mind, we conclude that Fogarty has not met his heavy burden of proving the irrationality of the Schedule I clas-

sification of marijuana.[4] First, the ongoing vigorous dispute as to the physical and psychological effects of marijuana, its potential for abuse, and whether it has any medical value, supports the rationality of the continued Schedule I classification. See

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[4] In so holding we are in accordance with the heretofore uniformly held view among federal courts that the Schedule I classification of marijuana is rational and, therefore, not violative of equal protection or due process. See United States v. Kiffer, 477 F.2d 349, 356-57 (2d Cir. 1972), cert. denied, 414 U.S. 831 (1973); United States v. Erwin, 602 F.2d 1183, 1185 (5th Cir. 1979) (Attorney General's failure to reclassify marijuana did not violate defendant's equal protection or due process rights); United States v. Maiden, 355 F. Supp. 743, 749 (D. Conn. 1973); Mat. Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 140 (D. D.C. 1980) (Three Judge Court); Wolkind v. Selph, 495 F. Supp. 507, 513 (D. Va. 1980), aff'd, 649 F.2d 865 (5th Cir. 1981) (Virginia's Controlled Substances Act, which classified marijuana as a Schedule I substance, complied with equal protection and due process mandates); United States v. Creswell, 515 F. Supp. 1268, 1271 (E.D. N.Y. 1981) (DEA's decision not to reclassify marijuana was not arbitrary nor an abuse of discretion in view of the continued controversial effects of marijuana).

National Organization for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 128-30, 136, 139-40 (D. D.C. 1980) (Three Judge Court) for Judge Tamm's excellent discussion of the current state of medical and scientific know-ledge concerning the uses and effects of marijuana. Furthermore, the three statutory criteria for Schedule I classification set out in § 812(b)(1) -- high potential for abuse, no medically accepted use, and no safe use even under medical supervision -- should not be read as being either cumulative[5] or exclusive.[6] Thus, even assuming, arguendo, that marijuana has some currently accepted medical uses, the Schedule I classification may nevertheless be rational in view of contervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk

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[5] See NORML v. Bell, 488 F. Supp. 140, Maiden, 355 F. Supp. 748-49, n.4.

[6] See 21 U.S.C. 811(c)(1)-(8), supra, which lists eight factors the Attorney General must consider in classifying a drug. Such factors include the current pattern of abuse, the risk to public health, and the scope and significance of abuse.

it poses to public health. See 21 U.S.C. § 811(c)(1)-(8). Finally, it should be noted that under Section 811 Congress has provided a comprehensive reclassification scheme, authorizing the Attorney General to reclassify marijuana in view of new scientific evidence. In establishing this scheme, Congress provided an efficient and flexible means of assuring the continued rationality of the classification of controlled substances, such as marijuana. See, Kiffer, 477 F.2d at 357.

Judgment affirmed. Costs assessed against Appellant.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
December 10, 1981
WILLIAM F. CLAYTON
Clerk
pkl

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)CR.81-10017-01
	) ORDER
GREGORY RICHARD FOGARTY,	)
	)
Defendant.	)

The defendant Gregory Richard Fogarty having today in open court made an oral motion to dismiss the indictment for violation of the Speedy Trial Act, 18 U.S.C. § 3161, on the grounds that defendant Gregory Richard Fogarty did not join in the motions for continuance filed by co-defendants Terry Michael Halgrimson, Gerald J. Maiers, and Dennis Fogarty, which motion was granted by Order dated November 24, 1981, continuing the trial date from

December 7, 1981 until January 6, 1982, which, defendant Gregory Richard Fogarty claims, resulted in a violation of his rights as an individual defendant to a speedy trial, and the court having determined that the defendants named in this conspiracy indictment should be tried together, and having determined pursuant to 18 U.S.C. § 3161(h)(7) that the period of delay between December 7, 1981, and January 6, 1982, is not an unreasonable delay, and that the ends of justice served by granting the motion for continuance joined in by the other co-defendants and not objected to by defendant Gregory Richard Fogarty outweighed the best interest of the public and the individual defendants in a speedy trial, it is hereby

ORDERED that defendant's Motion is DENIED.

Dated December 10, 1981.

BY THE COURT:

[Donald J. Porter]
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: _____
Deputy

(SEAL OF COURT)

APPENDIX C

BOYCE, MURPHY, MCDOWELL & GREENFIELD
Attorneys at Law
505 Northwestern National Bank Building
P.O. Box 5015
Sioux Falls, South Dakota 57117

October 7, 1981

Honorable Donald J. Porter
United States District Judge
Room 413, U.S. Courthouse
Pierre, South Dakota 57501

RE: CR. 81-10017-01,02,05, and 06 USA vs. GREGORY RICHARD FOGARTY, TERRY MICHAEL HALGRIMSON, GERALD J. MAIERS and DENNIS FOGARTY

Dear Judge Porter:

This letter is in response to Ms. Russell's letter of October 5, 1981.

First, you should be informed that a fifth defendant has been arrested in California. His name is Gailard Radcliffe and it is my understanding he will have his removal hearing the beginning of next week.

It is the Government's position that we would like to have one trial for all five defendants. According to Ms. Russell's

letter the first deadline under the Speedy Trial Act is November 16, 1981. Obviously, it is our position that the trial should be held before that date unless defense counsel are successful on a Motion to Continue. The Government will not resist a Motion for Continuance by the defendants as long as the trial can be scheduled within a reasonable time.

Yours sincerely,

BOYCE, MURPHY,
MCDOWELL & GREENFIELD

James E. McMahon

JEM/cjm
cc: Jeffrey Viken
Mr. Drew Johnson
Mr. Ronald Mechbecher
Mr. Greg Batron
Paul Hinderaker
Mr. Dan Moan

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	CR 81-10017
vs.	*	GOVERNMENT'S RESPONSE TO
GREGORY RICHARD FOGARTY, TERRY MICHAEL HALGRIMSON, GUILLAUME EUGENE HILLERS, GAILARD RADCLIFFE, GERALD J. MAIERS, DENNIS FOGARTY, LYNN MIZER,	*	MOTION FOR CONTINUANCE AND MOTION TO SUPPRESS EVIDENCE
Defendants.	*	

MOTIONS TO QUASH SEARCH WARRANTS AND SUPPRESS EVIDENCE

Terry Michael Halgrimson and Dennis Fogarty have submitted motions to quash search warrants and suppress evidence. The Government resists these motions on the

follow grounds:

1. Defendant Halgrimson and Defendant Dennis Fogarty have no standing to challenge the searches conducted in this case.

2. All searches conducted in this case were done so pursuant to valid search warrants.

3. There were sufficient exigent circumstances to justify a search without a search warrant.

4. The vehicles and other items that were searched had been abandoned.

5. Many of the items seized would fall under the plain view exception to the requirement of having a search warrant.

The Government requests a hearing be held on the Motion to Quash Search Warrants and Suppression Motions. A brief in oposition to

the Motion to Quash and Motion to Suppress will be filed with the Court after said hearing.

MOTION TO CONTINUE

Defendants Halgrimson, Maiers and Dennis Fogarty have moved for a continuance. The Government is prepared and stands ready to go to trial in this matter on December 7, 1981. However, the Government has no objection to the Court continuing this matter provided the Court finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the Defendant in a speedy trial and providing further that the trials for all of the defendants are continued so as not to result in separate trials.

Respectfully submitted,

D-4

BOYCE, MURPHY, MCDOWELL
& GREENFIELD

By [James E. McMahon]
James E. McMahon
Box 5015
Sioux Falls, SD 57117
Special Assistant
U.S. Attorney